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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

C/NET SOLUTIONS OF TENNESSEE, LLC et al., Plaintiffs and Respondents, v. NTL CAPITAL, LLC, Defendant and Appellant.	B216451 (Los Angeles County Super. Ct. No. BC400912)

APPEAL from an order of the Superior Court of Los Angeles County. Jerry K. Fields, Judge. Reversed and remanded.

Law Offices of Mark N. Strom and Mark N. Strom for Defendant and Appellant.

Brennan, Wiener & Associates and Robert F. Brennan for Plaintiffs and Respondents.

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Defendant and appellant NTL Capital, LLC (NTL) appeals from an order denying its special motion to strike under the "anti-SLAPP statute" (Code Civ. Proc., § 425.16).[1] The trial court concluded that NTL met its burden of demonstrating that the complaint against it arose from the protected litigation activity of filing an earlier lawsuit, but nevertheless found that plaintiffs and respondents C/Net Solutions of Tennessee, LLC, David Joel Chadwick and Paul Edward Hyde (collectively C/Net) showed a probability of prevailing on their claims for malicious prosecution and unfair and deceptive business practices under Business and Professions Code section 17200. We reverse, based upon our conclusion that C/Net did not demonstrate a probability of prevailing on its claims.

FACTUAL AND PROCEDURAL BACKGROUND

The earlier lawsuit was based on an "Equipment Lease Agreement" (the lease) entered into by C/Net and nonparty Crocker Capital, Inc. (Crocker), pursuant to which Crocker agreed to finance C/Net's lease of certain Motorola radio equipment. The lease recites that it was entered into on August 18, 2000, and is signed by C/Net's representative on that date. Crocker did not sign the lease until November 27, 2000. The lease states that the parties intend it to qualify as a statutory finance lease under Article 2A of the Uniform Commercial Code. The rental term was 36 months, and the first monthly installment payment from C/Net to Crocker was due on December 1, 2000. Paul Hyde and David Chadwick, members of C/Net, each signed personal guarantees dated August 18, 2000. Chadwick also executed an "Acknowledgment and Acceptance of Equipment by Lessee," bearing the date of October 23, 2000 typed under the words "Date of Acceptance." Beneath the date was the following paragraph: "Important: This document has legal and financial consequences to you. Do not sign this document until you have actually received *all* of the equipment and are completely satisfied with it."

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[1] SLAPP is an acronym for strategic lawsuits against public participation. Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure. An order granting or denying a special motion to strike under section 425.16 is appealable. (§§ 904.1, subd. (a)(13), 425.16, subd. (i).)

On or about December 1, 2000, Crocker assigned the lease to the Terminal Marketing Company, Inc. Terminal immediately assigned the lease to Terminal Finance Corp. II, which in turn assigned the lease to Wells Fargo Bank Minnesota, National Association (Wells Fargo), in its capacity as indenture trustee. Wells Fargo paid $42,159.70 for the lease. On December 30, 2003, after the last payment was due under the lease, a law firm representing Wells Fargo sent C/Net a letter advising that Wells Fargo had been assigned the lease and that if C/Net did not make full payment of all amounts due and owing under the lease within 30 days, Wells Fargo would file the enclosed complaint.

It was C/Net's position that the lease had been cancelled. C/Net responded by facsimile on January 20, 2004, stating that the lease was cancelled and requesting a letter from Wells Fargo releasing C/Net and its members from liability. C/Net enclosed a copy of a refund check stub from Crocker to C/Net dated February 12, 2001 in the amount of $2,814.84. According to Chadwick, the release was never provided, and C/Net had no response from Wells Fargo until three years later.[2]

On or about December 8, 2006, NTL purchased the lease, and several others, from Wells Fargo. In the purchase and sale agreement between Wells Fargo and NTL, Wells Fargo represented that it had informed NTL that "at least some of the lessees and guarantors under the Leases have disputed, and may be continuing to dispute, the validity and enforceability of the Leases." NTL agreed to assume the risk that some or all of the leases may be held either invalid or unenforceable, and NTL represented that it "is in the business of, and has experience and expertise in, evaluating and purchasing distressed and disputed claims and collectibles."

On December 21, 2006, Wells Fargo sent C/Net notice of the lease assignment to NTL. By letter dated January 23, 2007, NTL advised C/Net where payments should be sent. A month later, C/Net's attorney wrote to NTL stating that the lease had been

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[2] We note that C/Net's complaint in the instant lawsuit alleges that Wells Fargo sued C/Net in 2004, but dismissed the lawsuit.

cancelled, and enclosed copies of the refund check stub from Crocker and the facsimile it had sent to Wells Fargo requesting a release. NTL's attorney responded on February 27, 2007, requesting that C/Net provide any written evidence of a release of liability, and stating that it would investigate the matter with Wells Fargo's attorney. C/Net's attorney responded on March 1, 2007, reiterating C/Net's position that the lease had been cancelled. NTL's attorney responded the same day, again requesting release or cancellation documentation. The next day, NTL contacted Wells Fargo's attorney, who provided NTL with his firm's file on the lease, and responded by e-mail that Wells Fargo never sued C/Net despite the demand letter, and that his firm knew of "no lease cancellation instrument or release." On March 26, 2007, NTL's attorney sent another letter to C/Net's attorney, inviting settlement discussions.

On June 7, 2007, NTL sent its entire C/Net file to outside counsel, Hemar, Rousso & Heald (HRH), requesting the firm to initiate legal proceedings in California. NTL suggested that HRH first "reach out" to C/Net's attorney. By e-mail dated July 23, 2007, HRH advised NTL that "[i]t is our recommendation that suit be commenced at once." According to a declaration submitted by Kenneth G. Golub, a member of NTL, NTL elected to accelerate the balance due under the lease. The unpaid lease installments totaled $49,281.98. The lease also provided for interest at a rate of 18 percent per annum from December 1, 2000, and late charges at the rate of 10 percent per annum of the amount of each delayed payment.

The underlying action was filed on September 7, 2007.[3] A trial by jury was set for September 8, 2008. In August 2008, NTL investigated the solvency of the C/Net defendants, which included a review of their credit reports. According to Golub's declaration, the investigation revealed that the defendants were financially unable to satisfy a substantial judgment (in excess of $50,000). He further stated: "Based on a

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[3] The record contains a copy of a first amended complaint filed by NTL alleging causes of action for (1) breach of written agreement, (2) breach of personal guaranty, (3) breach of personal guaranty, (4) account stated, (5) indebtedness, and (6) unjust enrichment.

costs/benefit analysis of undergoing a multiple-day jury trial, marshaling multiple out of state witnesses and the uncertainty of collectability of the underlying defendants, it was determined by NTL that if the case could not be settled before trial, NTL would voluntarily dismiss the case prior to trial." On August 25, 2008, NTL filed a voluntary dismissal of the underlying action without prejudice. According to Chadwick, the C/Net defendants incurred more than $102,000 in fees and costs in defending the underlying action.

On October 30, 2008, C/Net, Chadwick and Hyde filed the instant action against NTL, alleging seven causes of action for (1) rescission, (2) intentional interference with prospective economic advantage, (3) libel and slander, (4) unfair and deceptive business practices (Bus. & Prof. Code, § 17200), (5) negligence, (6) abuse of process, and (7) malicious prosecution. In February 2009, NTL filed an anti-SLAPP motion as to all causes of action except rescission and negligence, relying on the above facts.

In opposition to the motion, C/Net relied on Chadwick's declaration, in which he stated that "C/Net canceled the lease very shortly—within days—after its execution, because Crocker did not fund the lease and C/Net obtained alternate financing for the lease from [the] Bank of Tennessee." He also stated that neither C/Net nor any of its officers or principals ever made any payments to Crocker under the lease, and at all times treated it as cancelled from the very beginning. Chadwick also stated that on February 11, 2001, Crocker refunded the first and last month's deposit "in response to our demand that the refunds be made because the lease had been cancelled." Attached to his declaration was a copy of a check from C/Net to Crocker, dated November 8, 2000 in the amount of $3,014.84, and the check stub from Crocker to C/Net dated February 12, 2001 in the amount of $2,814.84 ($200 less).

On May 6, 2009, the trial court issued an order denying the anti-SLAPP motion based on its findings that while the causes of action arose from an act in furtherance of NTL's constitutional right of petition, the C/Net plaintiffs had demonstrated a probability of prevailing on their claims. NTL filed a timely notice of appeal from this order on May 26, 2009. Because all other causes of action except negligence were dismissed

either voluntarily or by way of demurrer, this appeal concerns only the claims for malicious prosecution and unfair and deceptive business practices.

DISCUSSION

I. The Anti-SLAPP Statute and the Standard of Review.

The anti-SLAPP statute is aimed at curbing "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738–739.) The statute provides in relevant part: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) An act "in furtherance of" the right of petition or free speech includes "any written or oral statement or writing made before a . . . judicial proceeding"; "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body"; "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"; or "any other conduct in furtherance of the exercise of the constitutional right of petition . . . of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(1)–(4).)

There are two components to a motion to strike brought under section 425.16. Initially, the party challenging the lawsuit has the threshold burden to show that the cause of action arises from an act in furtherance of the right of petition or free speech. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) Once that burden is met, the burden shifts to the complaining party to demonstrate a probability of prevailing on the claim. (*Zamos v. Stroud, supra,* at p. 965; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.) To satisfy this prong, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by

a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568 [to establish a probability of prevailing, a plaintiff must substantiate each element of the alleged cause of action through competent, admissible evidence].) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We independently review the record to determine both whether the asserted causes of action arise from the defendant's free speech or petitioning activity, and, if so, whether the plaintiff has shown a probability of prevailing. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) We consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) In doing so, we do not weigh the evidence or compare credibility. Rather, our responsibility "'is to accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to *determine if it has defeated that submitted by the plaintiff as a matter of law.* [Citations.]'" (*Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 918.)

II. The Anti-SLAPP Motion Should Have Been Granted.

A. Protected Activity

C/Net contends that the trial court erred in finding that the challenged causes of action arose from an act in furtherance of NTL's right of petition or free speech. This contention is meritless.

C/Net's complaint alleges that "NTL prosecuted the lawsuit and forced plaintiffs to defend against it until less than one week before the trial date, in an effort to 'shake down' the plaintiffs and force them into paying a debt they did not owe." The complaint

further alleges if it were not for the collection lawsuit filed by NTL in the underlying action, C/Net would not have incurred more than $102,000 in costs and fees that it is now trying to recoup.

"It is beyond question that the initiation and prosecution of the prior suit here . . . [is] protected under the anti-SLAPP statute." (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017.) Further, our Supreme Court has held that malicious prosecution claims are not exempt from anti-SLAPP motions. (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 741.)

C/Net nevertheless argues that the statute does not apply here because NTL's underlying action was an illegal attempt to collect on a nonexistent debt. It is true that speech or petitioning activity that is "illegal as a matter of law" is not constitutionally protected and a defendant cannot use the anti-SLAPP statute to avoid liability. (*Flatley v. Mauro, supra,* 39 Cal.4th at p. 320.) In the anti-SLAPP context, conduct which is illegal as a matter of law may be shown either by the defendant's concession of illegality or by uncontroverted and conclusive evidence. (*Ibid*.) But C/Net has made no such showing here. It simply asserts that NTL's conduct "violates recognized statutory and common-law principles against instituting or maintaining unmeritorious 'shake down' lawsuits."

C/Net also argues that NTL has made no claim that C/Net brought the instant lawsuit for an improper purpose, i.e., that C/Net's "actual objective" was anything other than the recovery of damages incurred in the underlying action. But section 425.16 places no such requirement on a defendant in an anti-SLAPP motion. A defendant need only make a prima facie showing that the plaintiff's complaint "arises from" the defendant's constitutionally protected free speech or petitioning activity. "'When moving to strike a cause of action under the anti-SLAPP statute, a defendant that satisfies its initial burden of demonstrating the targeted action is one arising from protected activity faces no additional requirement of proving the plaintiff's subjective intent. [Citation.] Nor need a moving defendant demonstrate that the action actually has had a chilling effect on the exercise of such rights.'" (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 457.)

B. Probability of Prevailing

Our conclusion that NTL made a prima facie showing that the complaint arises from the exercise of its constitutional right of petition leads us to the second part of the section 425.16 test, which places the burden on C/Net to establish that there is a probability that it will prevail on its claims for malicious prosecution and unfair competition under Business and Professions Code section 17200. (*Governor Gray Davis Com. v. American Taxpayers Alliance*, *supra*, 102 Cal.App.4th at p. 458.)

1. Malicious Prosecution

The elements of a prima facie case of malicious prosecution are that the underlying action was (1) commenced by or at the direction of the defendant, and pursued to a legal termination in plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice. (*HMS Capital, Inc. v. Lawyers Title Co.*, *supra*, 118 Cal.App.4th at p. 213.)

a. Favorable Termination

Generally, when prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the underlying defendant's innocence of the misconduct alleged in the underlying action. (*HMS Capital, Inc. v. Lawyers Title Co., supra,* 118 Cal.App.4th at p. 214.) A voluntary dismissal not based upon the parties' settlement or consent, even where it is made without prejudice, is generally considered to be a favorable termination to support a malicious prosecution action. (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808; *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1335; *MacDonald v. Joslyn* (1969) 275 Cal.App.2d 282, 289 [voluntary dismissal, even without prejudice, generally not considered to be termination on technical grounds].) This rule rests on the assumption that one does not simply abandon a meritorious case. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400.) In *Sycamore*, the court held that a voluntary dismissal is

presumed to be a favorable termination, unless proved to the contrary by the party who prosecuted the underlying action and dismissed it. (*Ibid*.)

It is undisputed that NTL voluntarily dismissed the underlying action against C/Net without prejudice two weeks before trial. There is no evidence that the dismissal occurred as a result of a settlement between the parties or that it was based on C/Net's consent. Generally speaking then, such a voluntary, unilateral dismissal would be regarded as a favorable termination of the underlying complaint. (*Fuentes v. Berry, supra,* 38 Cal.App.4th at p. 1808.)

NTL argues that there can be no finding of a favorable termination here because the dismissal of the underlying action did not reflect a lack of liability of the C/Net defendants, but rather was based on economic reasons, i.e., NTL's investigation on the eve of trial of the C/Net defendants' credit reports showing the defendants had little financial ability to satisfy a judgment against them. But as C/Net points out, a consumer credit report reveals only the existence and activity of a consumer's credit accounts. It does not show assets, available equity in real estate, insurance, bank balances or investment account balances, and it would reveal no information about the corporate entity, C/Net. Moreover, we note the evidence shows that NTL had the credit reports *prior* to initiating the underlying action, and that NTL included them in the file sent to its outside counsel. We agree with C/Net that a jury could reasonably infer that NTL's "credit check" story is disingenuous and that NTL dismissed its lawsuit due to concern about its ability to prevail at trial. Where there is a conflict as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 198.) Accordingly, we find that C/Net made a sufficient showing as to the favorable termination element of its malicious prosecution claim.

b. Probable Cause

An action is deemed to have been pursued without probable cause if it was not legally tenable when viewed in an objective manner as of the time the action was initiated

or while it was being prosecuted. The court must "determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 878.) The test the court is to apply is whether "any reasonable attorney would have thought the claim tenable . . . ." (*Id*. at p. 886.) "In analyzing the issue of probable cause in a malicious prosecution context, the trial court must consider both the factual circumstances established by the evidence and the legal theory upon which relief is sought. A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164–165.)

The determination as to whether there was probable cause to initiate an action "depends on the facts known to the litigant or attorney at the time the action is brought. [Citation.]" (*Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 822, fn. 6.) Prior to filing the underlying action, NTL had the following information: Copies of the lease executed by C/Net, the personal guarantees signed by Chadwick and Hyde, and the "Acknowledgment and Acceptance of Equipment by Lessee" signed by Chadwick. NTL was also aware that C/Net was claiming that the lease had been cancelled on the ground that Crocker never funded it. When NTL repeatedly asked C/Net to provide documentation establishing a release or cancellation, C/Net produced only a check stub from Crocker that stated "refund," and was dated two months after Crocker had assigned the lease. The copy of the check stub provided by C/Net to NTL had handwriting on it that said "cancel" and "Paul Hyde"; but the copy of the check stub provided by C/Net to Wells Fargo did not contain this handwriting. NTL also had Wells Fargo's attorney's file pertaining to the lease, and the information from Wells Fargo's attorney that his firm had no release or cancellation documentation.

Additionally, NTL had the recommendation of its outside counsel to initiate the underlying action. NTL also points out that case law supported its action, relying on *Wells Fargo Bank Minnesota, N.A. v. B.C.B.U.* (2006) 143 Cal.App.4th 493. That case involved an equipment lease negotiated between Crocker as the lessor and B.C.B.U. as

the lessee, which appears to be identical to the lease here. Like our case, Crocker assigned the lease to Wells Fargo, which sued B.C.B.U. and its guarantor. The defendants argued that they had valid defenses against Wells Fargo despite a lease clause that waived all defenses by a lessee against an assignee. (*Id*. at p. 496.) The appellate court affirmed the judgment in favor of Wells Fargo, finding that the waiver of defenses clause was enforceable by Wells Fargo as assignee of the lease under California Uniform Commercial Code section 9403, and that B.C.B.U. did not establish any cognizable defense, including a defense of cancellation. (*Wells Fargo Bank Minnesota, N.A. v. B.C.B.U.*, *supra*, at p. 508.)

The question here is whether the information NTL had prior to filing its lawsuit against C/Net was sufficient to make the lawsuit legally tenable. We are satisfied that it was. The facts before the trial court were undisputed. The only dispute was the conclusion to be drawn from those facts. C/Net's evidence, if credited, merely creates a bona fide dispute as to whether the lease was cancelled. It does not demonstrate that NTL *knew or believed* the lease was cancelled. "[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon it being *arguably tenable*, i.e., not so completely lacking in apparent merit that no reasonable attorney would have thought the claim tenable." (*Wilson v. Parker, Covert & Chidester, supra*, 28 Cal.4th at p. 824.) "'Probable cause may be present even where a suit lacks merit. . . . Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which *all* reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause.'" (*Jarrow Formulas, Inc. v. LaMarche, supra*, 31 Cal.4th at p. 743, fn. 13.)

C/Net attempts to alter this conclusion by arguing that NTL, as the plaintiff in the underlying lawsuit, should have conducted further investigation, including contacting Crocker, which was apparently defunct, and, at the very least, the Bank of Tennessee, which ultimately provided the alternate funding. But C/Net points to no place in the

record showing that it ever informed NTL that the Bank of Tennessee had provided alternate funding. Nor is there anything in Chadwick's declaration about whether or when the equipment was ever delivered. Instead, NTL had before it: a copy of what appeared to be a valid lease, executed personal guarantees and a signed acknowledgement that the equipment had been delivered; C/Net's word that the lease had been cancelled; and a copy of a refund check stub from Crocker. Based on this information, we cannot conclude that no reasonable attorney would have thought the underlying lawsuit tenable at the time it was initiated.

C/Net also argues that NTL lacked probable cause to bring the underlying lawsuit because it was time-barred. In its opposition to the anti-SLAPP motion, C/Net argued: "The underlying action was time-barred by operation of any applicable statute of limitations. C.C.P. § 337 (four-year statute for suit on breach of a written agreement). The breach in this case occurred not later than the fall of the year 2000." Although C/Net presented no further analysis below, on appeal the parties spend some time on this issue. NTL contends there are three reasons why the underlying action was not time-barred.

First, the lease provided for monthly installment payments. Where money is payable in installments, each unpaid installment has its own four-year statute of limitations. (*Bank of America v. McLaughlin* (1957) 152 Cal.App.2d Supp. 911, 915.) The last installment payment under the terms of the lease was scheduled for December 1, 2003. Thus, the earliest that the four-year statute of limitations would have barred an action to collect was December 1, 2007. The underlying action was filed on September 7, 2007. Even C/Net recognizes that under this theory, NTL could have, at the very least, pursued payment of the three unpaid installments due after September 7, 2007.

Second, the lease provided that it could be continued from month to month on the same payment schedule until 30 days after return of the equipment by the lessee. There is no evidence that C/Net ever returned the equipment. Thus, NTL would not be time-barred from collecting on all monies due and owing under the lease as of the date of filing the underlying action.

Third, under the lease's election of remedies provision, the lessor had the option to accelerate all payments due upon a default. There is no evidence that either Crocker or the Terminal parties elected to accelerate all sums due and payable under the lease. Although it is unclear whether Wells Fargo made such an election, Golub's declaration submitted by NTL states that NTL affirmatively elected to accelerate all payments due and owing after it took assignment of the lease in late 2006, but the date of the election is not clear. Where a contract contains an acceleration clause, the statute begins to run on installments not yet due when the creditor, by some affirmative act, manifests its election to declare the entire sum due. (*Garver v. Brace* (1996) 47 Cal.App.4th 995, 1000.)

Thus, C/Net's statute of limitations argument does not demonstrate that the underlying action was completely time-barred such that no reasonable attorney would have thought the underlying action tenable. Indeed, if the statute of limitations defense was so clearly established, it would seem likely that the underlying lawsuit would have been dismissed on this ground.

We also note that C/Net did not present any evidence that NTL lacked probable cause to continue the lawsuit after it was initiated. The tort of malicious prosecution is not limited to the initiation of a lawsuit, but includes *continuing* to prosecute a lawsuit discovered to lack probable cause. (*Zamos v. Stroud*, *supra*, 32 Cal.4th at p. 970.)

There is very little discussion by the parties of the underlying litigation proceedings, and no evidence of what discovery was taken. In his declaration, Chadwick states that on August 20, 2008, which was five days before the underlying lawsuit was dismissed, C/Net contacted the State of Tennessee and ordered a copy of the UCC-1 financial statement filed on October 31, 2006 by Wells Fargo regarding the lease, which was less than two months before Wells Fargo assigned the lease to NTL. NTL does not dispute that this was the only UCC-1 statement filed in connection with the lease. C/Net points out that NTL offers no explanation for why its predecessors did not file a UCC-1 statement themselves, and concludes that Wells Fargo's belated filing of the statement tends to demonstrate its "complicity in trying to resurrect a patently invalid debt and [NTL's] constructive, if not actual, knowledge of the fraud." But NTL is not responsible

for what its predecessors did or did not do. And C/Net's argument is not evidence, but merely speculation about what the late filing means. The question is whether the late-filed UCC-1 statement caused NTL's underlying action to be untenable. Under the circumstances here, we can make no such finding.

Because we find that C/Net failed to demonstrate that NTL's malicious prosecution claim lacked probable cause, we need not address the third element of malice. Instead, we conclude that the trial court erred in denying the anti-SLAPP motion as to the malicious prosecution claim.

2. Unfair and Deceptive Business Practices

Neither below nor on appeal does C/Net set forth a separate basis to support its cause of action for unfair and deceptive business practices under Business and Professions Code section 17200. Because this claim is apparently based on the same theory and evidence as the malicious prosecution claim, we likewise find that C/Net failed to establish a probability of prevailing on this claim. Accordingly, we conclude that the trial court erred in denying the anti-SLAPP motion as to the cause of action under Business and Professions Code section 17200.

DISPOSITION

The order denying the anti-SLAPP motion is reversed. The trial court is directed to enter a new order granting the motion. NTL is entitled to recover its attorney fees and costs, including those on appeal, in an amount to be determined by the trial court on remand. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499–1500; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1405; *Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 812–813.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST